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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 942

JOHN N. LENZ,
Petitioner,

vs.

ALBERT E. COBO,
Mayor of the City of Detroit,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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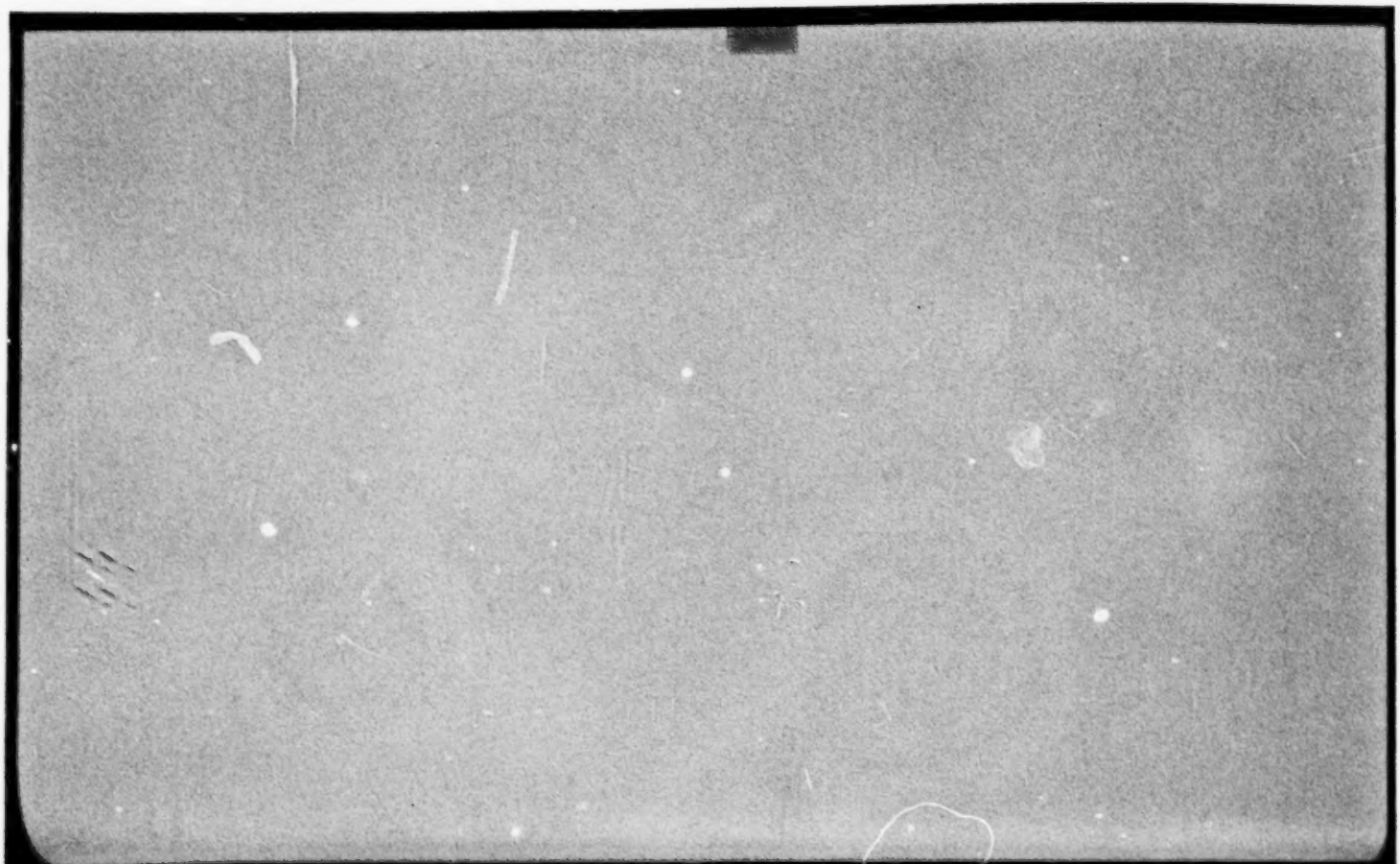

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. .....

JOHN N. LENZ,
Petitioner,
vs.
ALBERT E. COBO,
Mayor of the City of Detroit,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner, John N. Lenz, by Craig Thompson, his Counsel, respectfully presents herewith his petition for a writ of Certiorari to be directed to the Supreme Court of Michigan, in the City of Lansing, Michigan, the highest Court in said state, for a review of the record in said court of the hearing and judgment rendered in the above captioned cause. And in that behalf respectfully submits the following summary, statement, question involved, basis of this Court's jurisdiction, and reasons for allowance of Writ of Certiorari.

Petitioner was discharged from the employ of the City of Detroit, Michigan, November 14, 1949 without a hearing, after continuous prior service with said City of Detroit for nineteen years (P. 2, Record).

The charges, first communicated to petitioner with his notice of discharge, included insubordination, conduct unbecoming a city employee, threatened intimidation of em-

ployer, misuse of Council office, and fraudulent use of Council stationery (P. 2) (P. 28).

Petitioner asked for and was granted a hearing before the Detroit Civil Service Commission, which was held November 28, 1949 and on December 12, 1949 (Pp. 30 and 60).

The Detroit Civil Service Commission held that it had no authority or jurisdiction to review said discharge except to determine if the discharge was made for religious or political (P. 31) reasons and found that the motive was not political, and therefore upheld the discharge because it held it had no jurisdiction to do otherwise (P. 83).

A petition for a rehearing before the Civil Service Commission was denied February 13, 1950 (P. 83).

On December 14, 1949 petitioner demanded a hearing on his discharge before the Mayor of the City of Detroit, Mich. (P. 85) under provisions of a state statute known as the Veterans Preference Act, being Act 205, *Public Acts*, 1897, as amended, and being *Michigan Compiled Laws* of 1948, Section 35.402, et seq. (P. 22).

Said hearing was perforce granted, and what purported to be said hearing was held January 27, 1950 before Mayor Albert E. Cobo, respondent herein (P. 93, et seq.).

The said Veterans Preference Act provides for a "full hearing" at which the veteran shall be surrounded by all the necessities of due process of law (P. 130) and the duty of respondent under said statute was to order the employee's discharge or re-instatement, after the full hearing was held by due process of law.

It is this alleged hearing which completely violated petitioner's right to due process of law, in the following particulars:

(a) Because some of the charges were made to some degree specific only ten days before the hearing (P. 3 of minority opinion of Supreme Court) and

(b) Because of the conduct of the hearing itself. The charges were read, a witness offered testimony adverse to petitioner, and was questioned in some detail in attempted corroboration of the charges. Petitioner was then questioned briefly, following which the respondent Mayor abruptly ended the hearing, saying "Sorry that is the end of the hearing." (P. 3 Minority opinion Supreme

Court Michigan). The hearing was then and there concluded without hearing petitioner in his own defense, without permitting evidence of his exhibits, and without hearing witnesses who were present to testify in petitioner's behalf. (1st paragraph P. 4, Minority Opinion, Supreme Court, Michigan).

This truncated interview was no hearing in that it arbitrarily and arrogantly deprived petitioner of his right to due process of law and withheld from him even the rudiments of fair play.

Following said alleged hearing respondent ordered petitioner discharged, in a letter dated February 6, 1950 (P. 108, Record) but set no date for discharge and by inference related it retrospectively to original date of discharge.

Petitioner, after many searches for the next step for relief, and many consultations with many persons, fruitless for a while, finally secured the preparation and filing of a petition for writ of Mandamus in the local court (P. 6, Minority opinion). Said petition was filed in Wayne County, Michigan February 5, 1951. Said proceeding was before the said court almost two years before determination by the Court. On January 28, 1953, said Court granted and entered a judgment of Mandamus as prayed by petitioner.

The Respondent immediately appealed to the Supreme Court of the State of Michigan and that Court handed down a decision on December 29, 1953, that Mandamus was not the proper remedy, and vacated the lower Court's judgment. Petitioner forthwith applied to Michigan Supreme Court for a re-hearing, which was denied on February 18, 1954.

Thereafter, on September 24, 1954, petitioner sought relief on the same set of facts, by filing petition for writ of Certiorari, in Wayne County, Michigan Circuit Court, return was filed by Respondent, and said Circuit Court, after due consideration of the record, entered judgment February 10, 1955, quashing the proceedings before the Respondent Mayor of Detroit, as being of no legal effect, and setting aside the order of discharge signed by Respondent Mayor (P. 140, Record).

Respondent Mayor of Detroit appealed for relief to the Supreme Court of Michigan on March 18, 1955, which Court handed down a divided opinion December 1, 1955, the

majority holding that petitioner was guilty of laches, and saying nothing concerning petitioner's contention that the hearing before the Respondent Mayor, and consequent discharge, violated his right to due process of law and was therefore void (P. 1 to 4, Opinion, Supreme Court, Michigan).

On the contrary, the Minority opinion in said Supreme Court of Michigan, met squarely the issue of due process — it being the only time in two hearings before the Supreme Court that the issue was met — and held that petitioner's right to due process had been denied him and that the respondent Mayor's hearing and order of discharge was therefore void, quoting *Morgan vs. U. S.*, 304 U. S. 1 (P. 1 and 2, Minority Opinion).

Petitioner filed application for rehearing December 20, 1955, in the Supreme Court, Michigan, which was denied March 1, 1956 (Transcript Supreme Court of Michigan proceedings).

From the outset, and throughout all the proceedings in Michigan Courts, from February 5, 1951 to March 1, 1956, the basic issue placed before the trial court and highest appellate court, was the serious and deliberate sacrifice of petitioner's right to even the rudiments of fair play, and even the rudiments of due process of law. This violation of right to due process destroyed important property rights of petitioner, — his right to pension as a city employee after 19 years of service, plus sick leave and overtime pay due him at time of discharge. This taking of petitioner's property without due process of law, in violation of the 14th Amendment to United States Constitution, was done by a municipality of the State of Michigan, was twice ruled void by the Michigan trial Court, and was twice by inference approved by the Michigan Supreme Court, highest state court, reversing trial court.

The Federal Constitutional question was thus squarely presented in the pleadings throughout (P. 12, record) was decided to be a violation in trial Court. The Majority of the Supreme Court of Michigan, to whom Certiorari is hereby prayed, evaded the Constitutional issue twice, and reversed trial court on ground of laches.

We contend that the Federal Constitutional issue was squarely presented throughout, and that whether a Federal question was presented to the State Court, is itself a Fed-

eral question, giving jurisdiction to this court to review the judgment. (*Lowell vs. Griffin*, 303 U. S. 444).

It is important, we believe, to consider that the ground on which the Majority of the State high court handed down its judgment; namely laches, could not be judicially determined without first deciding the issue of due process; because if petitioner did not receive due process his discharge is void, and could be attacked at any time, anywhere, and doctrine of laches could not legally be applied. Therefore the high court inferentially decided the Federal question adversely to this petitioner, and not in accordance with the prevailing decisions of this Court on violation of due process of law. This fact gives this court jurisdiction (*U. S. S. C.* Rule 38); (*Honeyman vs. Hanan*, 300 U. S. 14; *Grand River Dam vs. Grand Hydro.*, 335 U. S. 359; *Dixon vs. Duffy*, 344 U. S. 143).

Further, it seems to us obvious that the majority opinion of the Supreme Court of Michigan, resting on laches, was not only illegal as pointed out in preceding paragraph, but was also a mere device for failing to meet the issue of the Federal Question, and preventing review of that question, and therefore cannot defeat the jurisdiction of this court to review. (*McCoy vs. Shaw*, 277 U. S. 302; *Dixon vs. Duffy*, 344 U. S. 143).

The question presented on this record is whether petitioner's right to due process of law under the 14th Amendment to the U. S. Constitution was violated in the proceedings effecting his discharge, by the City of Detroit, whether the Supreme Court of Michigan, the State's highest court, upheld that violation of due process, whether the discharge is void or voidable, because of lack of due process.

It is well to consider that the only judges meeting the issue of due process; namely, the Michigan trial judge and the Minority of the Michigan Supreme Court, hold positively and emphatically that petitioner had been deprived of due process and his discharge was void. (P. 140, Record). (P. 4, Minority opinion, Supreme Court of Michigan). The majority evaded the issue.

The rights to due process were fully required by the State Statute involved (*Compiled Laws of Michigan* 1948, Sec. 35.402) but such rights are also required by the U. S. Constitution, and by decisions of this Court (*Morgan vs. U. S.*, 304 U. S. 1).

The jurisdiction of the Supreme Court of the United States is not affected because the existence of the right depends on state law. (*Fox River Paper Co. vs. Railroad Commission,* 274 U. S. 651).

In short, the record shows that the Supreme Court of Michigan, the highest court in the state, by a decision not unanimous, did take petitioner's property without due process of law as guaranteed by the 14th Amendment to the Constitution, and did so by arbitrary, capricious, evasion of that question, resorting instead to a tortured, strained, application of the doctrine of laches; that determination of the constitutional question was a condition precedent to the application of the doctrine of laches, and that the Michigan Supreme Court therefore, necessarily, if only inferentially decided that question adversely to the prevailing opinions and judgments of this Court.

The so-called evidence that the Michigan Supreme Court used in assuming laches, was submitted by Respondent, contrary to the decision of that court (See *People vs. Kircher,* 322 Mich. 158; *Randolph vs. Dearborn,* 298 Mich. 224), where they found that no evidence could be submitted in a Certiorari case.

The so-called evidence furthermore covered actions which were in themselves contrary to the 14th Amendment, if they took petitioner's property without due process of law; i.e. Common Council resolution changing titles to jobs, and Civil Service Commission resolution abolishing title to job. As our brief contends, change of title did not abolish the work, nor any work petitioner could do and had done previously.

It is also submitted, that in denying petitioner's request for rehearing, the Michigan Supreme Court failed to abide by the Michigan Constitution, which requires that they give reasons for their decisions, and append their vote on the denial; — another lack of due process of law.

Wherefore your petitioner prays that a Writ of Certiorari be issued under the Seal of this Court, directed to the Supreme Court of the State of Michigan, commanding the said Court to Certify and send to this Court, on day and date to be designated, a full and complete transcript of the records and proceedings of the said Supreme Court of the State of Michigan had in said cause. To the end that the said cause may be reviewed by this Honorable

Court as provided by law, and that this Court may order to be done in said cause, what of right and law ought to be done, and that the judgment of the Supreme Court of Michigan may be reversed and adjudged to be void, and for such other relief as may be deemed proper by this Court.

John N. Lenz,
Petitioner.

Craig Thompson,
Attorney for Petitioner.
Business Address:
710 Penobscot Building,
Detroit 26, Michigan.
WO. 5-7480.

STATE OF MICHIGAN
SS:
COUNTY OF WAYNE

John N. Lenz, being duly sworn, deposes and says that he has read the foregoing petition for writ of certiorari by him signed, that he knows its contents, and that same is true, except as to those matters therein alleged upon information and belief, and as to those matters he believes it to be true.

John N. Lenz,
Deponent.

Subscribed and sworn to before me this 2nd day of May, A.D. 1956.

Alice A. Hill,
Notary Public, Wayne County, Michigan.
My commission expires February 3, 1959.

APPENDIX

OPINIONS
(Filed Dec. 1, 1955)

(June Term, 1955)

STATE OF MICHIGAN
SUPREME COURT

John N. Lenz,
Plaintiff and Appellee,
vs.
Albert E. Cobo, Mayor of the City of Detroit,
Defendant and Appellant.

BEFORE THE ENTIRE BENCH.

DETHMERS, J.

The facts are largely set forth in Lenz vs. Mayor of Detroit, 338 Mich. 383, in which we dismissed mandamus commenced in the circuit court on the ground that certiorari was the sole remedy available to review the action of the mayor approving and ordering plaintiff's discharge as a city employee after hearing before the mayor under the veterans' preference act. CL 1948, §35.402 et seq. (Stat. Ann. §4.1222 et seq.).

The mayor's order of discharge issued February 6, 1950, and plaintiff delayed instituting the mandamus proceedings until February 5, 1951. Our decision in that case was announced December 29, 1953, and rehearing denied February 18, 1954. Plaintiff again delayed until September 24, 1954, before filing in the circuit court his petition for certiorari in this cause. The original notice to plaintiff of his discharge was dated November 14, 1949. The records in the mandamus case and at bar disclose that on November 9, 1949, the common council unanimously voted to abol-

ish the two positions of legislative clerk, of which plaintiff held one, and on November 15, 1949, adopted a formal resolution abolishing them, the work thereof being thereby directed to be divided among and assigned to various other employees already in the employ of the city. On September 18, 1950, the civil service commission discontinued the classification of legislative clerk in city employment and it has not since been recreated.

Plaintiff seeks reinstatement to an abolished position, with resultant disruption of the existing system under which the duties of the abolished positions have been distributed and otherwise integrated therein, and giving rise to a serious question of rights to pension and unearned back pay for a six-year period. In both the mandamus and certiorari cases defendant affirmatively raised the defense of laches, supported by testimony in the mandamus case and in this case by an affidavit attached to the motion to quash the writ of certiorari, showing such facts, which indicate that reversal of the proceedings discharging plaintiff would result in prejudice, detriment and inconvenience to the public service. Under such circumstances we believe that plaintiff's delay of one year after the mayor's order of discharge before commencing the mandamus proceedings, with subsequent delay of almost 3 years occasioned by that ill-starred selection of remedy, and his further delay of nine, or at the least seven, months after decision by this Court in the mandamus case before commencement of this action, render him guilty of laches. Jones vs. Doonan, 265 Mich. 384; McGregor vs. Carney, 271 Mich. 278. Plaintiff cites Chamski vs. Board of Auditors, 288 Mich. 238, to the contrary. The holding in that case was that plaintiff there could not be held guilty of laches because it is an affirmative defense and no testimony had been offered on the question. The case is, in that respect, distinguishable from that at bar.

While CL 1948, §609.19 (State. Ann. §27.611), cited by plaintiff, serves to suspend the bar of the statute of limitations under certain circumstances (McOmber vs. Chapman, 42 Mich. 117), the statute is not controlling of the question of laches. See In the Matter of Lantis, 9 Mich. 324, in which we held that the writ of certiorari at common law is not one of right, but rests in the sound discretion of the court, to be allowed or not as may best promote the ends

of justice, and that a statutory provision requiring the writ of certiorari to be issued within two years did not take away the discretionary power of the court to quash for laches in not suing out the writ sooner.

Plaintiff stresses that the trial court decided in the mandamus proceeding that no laches existed and that this Court, on appeal therefrom, did not disturb that finding. Defendant did urge laches on appeal but there was no occasion to pass on it inasmuch as we held mandamus not the proper remedy. Decision in that case was, therefore, not conclusive of the question of laches.

Judgment of the court below setting aside the mayor's order of dismissal is reversed and the writ quashed, without costs, a public question being involved.

Leland W. Carr,
Henry M. Butzel,
Emerson R. Boyles,
Neil E. Reid,
Harry F. Kelly,
Concurred with Dethmers, J.

STATE OF MICHIGAN
SUPREME COURT

John N. Lenz,
Plaintiff-Appellee,
vs.
Albert E. Cobo, Mayor of the City of Detroit,
Defendant-Appellant.

BEFORE THE ENTIRE BENCH.

Smith, J. — For Affirmance.

This case having been heretofore before this Court (Lenz vs. Mayor of Detroit, 338 Mich. 383) and the facts having therein been stated in detail, we will not burden the rec-

ord with additional recitation, saving to the extent necessary for the purpose of our holding herein.

At the heart of the case is a question of statutory compliance and due process. The statute involved is P. A. 1897, No. 205, as amended, (C. L. 1948, §35.401 et seq. [Stat. Ann. §4.1221 et seq.]). This act, widely known as the veterans' preference act, finds its counterpart in many States of the Union. The purpose of the act is to protect the welfare of veterans by imposing safeguards with respect to their employment and discharge. On the merits, we are here primarily concerned only with one, the requirement that the veteran have a "full hearing" on charges preferred against him as a condition precedent to his valid discharge. (C. L. 1948, §35.402 [Stat. Ann. §4.1222]).

The complexities of modern society are such that it is no longer possible that our traditional courts of law pass upon all questions, even all those judicial in nature, which confront our citizens. The power to hear, and to decide, has for some purpose been placed in administrative tribunals, and officials. It is before them that the citizen has his hearing, or the "full hearing" sometimes prescribed by statute. We need not compile a catalogue of the essential elements of a full hearing. The literature is voluminous. See Cooper, Administrative Agencies and the Courts, 149 et seq. In essence, the citizen must be told with clarity and in detail just how he has offended, and then given his day in court in defense of his actions, whether that "court" be an administrative body or official acting quasi-judicially, or the traditional judicial tribunal. The Supreme Court of the United States, in Morgan vs. United States, 304 U. S. 1, well stated the requirement:

> "Congress, in requiring a 'full hearing,' had regard to judicial standards, — not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature."

The citizen, to put it even more simply, "shall be protected by the rudimentary requirements of fair play." *Id.* 15. His right to a hearing "embraces not only the right to present evidence but also a reasonable opportunity to

know the claims of the opposing party and to meet them." *Id.* 18.

It is never to be forgotten that when the administrative official acts in a quasi-judicial capacity, when he moves from the swivel chair to the woolsack, he becomes, for a brief moment, the guardian of the Grail. In his custody and subject to his exercise are the great liberties and inviolable rights of each of our people. The citizen before him, awaiting his judgment, is no longer an associate or subordinate, merely. He is the accused. He stands attended by the Bill of Rights, without cast or color of obliquity, entitled to respect, to patience, and to ample opportunity to answer in detail the charges with which he is confronted. He is to be neither harried nor hurried.

Tested by these standards, appellee's hearing before the mayor of Detroit was fatally defective, (1) because of the mode of presentation of charges, which were made to some degree specific, in response to his demand, only 10 days before the hearing, and (2) because of the conduct of the hearing itself. After the charges were read, a witness offered testimony, adverse to appellee, and was questioned in some detail in attempting corroboration of the charges made. Appellee himself was then questioned briefly, following which the mayor brought the hearing to an abrupt close in the following manner:

> "MR. COBO: For the purpose of intimidation?
>
> "MR. LENZ: It wasn't for that purpose.
>
> "MR. COBO: Well now, give me some better logic or I will have to call this matter off.
>
> "MR. IDE: You have your file here (to Mr. Lenz).
>
> "MR. LENZ: (Sorting through papers and repeating statements made above).
>
> "MR. COBO: You are just going around and around and that is not an answer. Your own testimony convicts you. Sorry, that is the end of the hearing."

The hearing was thereupon concluded. Thus the only testimony offered in Lenz's behalf at the mayor's hearing was that contained in his own answers to the few questions asked of him with respect to certain of the charges made. The record is barren of any adequate opportunity extended

him to cross-examine, to make a formal defense, to document his denials with letters and exhibits, or to introduce witnesses in his own behalf. The defects are the more glaring because it is clear from the record of the original mandamus proceedings (utilized in the instant case by both parties) that Lenz had documentary evidence, as well as verbal testimony which he desired to submit in his behalf. He was thereafter found "guilty as charged" and the order given was that he "be discharged as a city employee".

This truncated interview was no hearing, as that term is employed in the statute. It violated the rudimentary requirements of fair play. It did not accord Lenz due process of law. Appellant's brief minimizes the effect of testimony sought to be introduced by Lenz, utilizing for such purpose the records of the previous mandamus action. "We want," states appellant's brief, "no mistaken impression left with this Court that there was significant or controlling testimony excluded by the conduct of the defendant," referring, apparently, to the abrupt termination of the proceedings. Whether Lenz's testimony would have been significant or controlling was a matter for the oath and conscience of the hearing officer, not the determination of Lenz's adversary. But whether or not it would, in fact, "be of sufficient probative force to influence the findings" (again using appellant's language) Lenz was entitled to introduce it and to argue its probative force to the hearing officer and upon possible appeal. We do not indulge the presumption that proffered testimony in defense will be fruitless. We cannot condone the exclusion of defenses on the ground that they aren't very strong defenses.

It is not necessary to decision in this case that we trace in detail the paths trod by the litigants in their efforts to reach final adjudication. Plaintiff's first effort was in mandamus. As to that, we ruled (Lenz vs. Mayor of Detroit, supra) that he had mistaken his remedy. He started over, this time in certiorari, and again he comes before this Court as the appellee. (Those interested in exploring this procedural problem may profit by a comment in 27 Iowa LR 291, in which the author describes the "similarities and partial overlapping" of certiorari and mandamus, comment upon the hardships to litigants who select the wrong proceedings, and notes the method of avoidance, under both

New York and the Federal rules, of the "procedural pitfalls" presented).

Before us, then, on appeal from certiorari, my brother would reverse the judgment below and quash the writ because of laches arising from the appellee's delay in filing his original mandamus action, and also in starting over again in certiorari.

I cannot agree. The doctrine of laches is an equitable concept of flexible import, not governed by rigid rules. Controlling in the concept is the idea of inaction, of sleeping on one's rights, of negligence, which, with the passage of time and change of conditions, render the assertion of the right inequitable. Humiston, Keeling & Co. vs. Yore, 181 Mich. 629. Primarily, and in the context before us, it in a question of fact. Oliver vs. Poulos, 312 Mass. 188 (44 N.E. 2d 1); Shanik vs. White Sewing Machine Corporation, 25 Del. Ch. 371 (19 A. 2d 831). See, also Upell vs. Bergman, 246 Mich. 82, and Hope vs. Detroit Trust Co., 275 Mich. 213. In its determination all the above-described diverse elements are weighed, the prejudice to the defendant against the explanations of the plaintiff. The resolution is one peculiarly appropriate to the trial court. In such court plaintiff testified of his efforts to obtain legal counsel. There was a reluctance to sue the City Hall. As one of the attorneys approached put it, "You need a slambang of a lawyer." He, it is noted in the record, was "getting old", and he obviously spoke with the fatigue of the years. Eventually counsel was obtained and the suit started. The picture here presented is not one of rest, sleep, and quiet on the part of one who, with full knowledge of his legal rights, prefers inactivity to assertion. Rather it is one of consultation, of inquiry, and of pleas for legal aid. They were fruitless for a time, it is true, but nevertheless it is action, not repose. We find nothing affirmative in the record to sustain defendant's defense of laches except the mere passage of time, which does not merit our comment, and the asserted change of conditions due to the counsel's abolition of plaintiff's position, that of legislative clerk, the day after his discharge. The record is clear, however, that such abolition did not take the other legislative clerk (there were two such, Lenz and Hardy) off the city pay roll, he having been transferred to other work at the same pay, and a similar solution, the

record indicates, was at one time contemplated with respect to plaintiff but rejected because of actions taken by him.

This, then, is defendant's defense of laches, unreasonable delay before starting the original mandamus action. It has been twice rejected by the trial court. We find no error of law in such rejection.

Moreover, my conscience troubles me about its application as a ground for decision in this Court. In the original mandamus action the question of laches was argued, was decided by the trial court, was claimed as a reason and ground for appeal, and was brief to the court. We held, in substance, that Lenz had mistaken his remedy, that "the sole remedy available" to him was certiorari. Appellee argues that implicit in such holding, or necessarily included therein because of our failure to disturb the trial court's holding of no laches, is our holding that his remedy was not lost by laches. This we reject. We did not pass on the question of laches. But the application of the doctrine of laches to the case at bar cannot be settled by any mechanical rule as to whether or not one ground of decision necessarily includes or rejects others. The question involves the application of an equitable doctrine controlled by equitable considerations, a formula whereby the conscience of the court finds expression. As to this we are clear: We do not regard it as consonant with our practice that in a litigant's second appearance in this Court in the same case he be struck down in part because of a non-jurisdictional defect existing, if at all, before we heard him the first time and concerning which, though then briefed to us, we refrained from comment, particularly in view of the fact that our ruling then on such ground would have finally disposed of his action and would have saved him his long and expensive second journey into this Court.

As to alleged delay in starting over again in certiorari, appellee argues on the record before us that under C. L. 1948, §609.19 (Stat. Ann. §27.611), he had a year within which to file the proper action. My brother concludes that counsel was in error, that the statute does not apply. But, on the question of laches, it is immaterial whether counsel was right or wrong, so long as he was acting in good faith, and the contrary is nowhere intimated in this record. Even if counsel were wrong, appellee was relying on his advice.

This is not sleeping on his rights, not negligence in the prosecution of his claim, and is not passive inaction. It is our opinion that delay under advice of counsel cannot constitute laches unless so gross as to raise the question of bad faith. Sioux Falls Savings Bank vs. Lien, 14 S. D. 410 (85 N. W. 924); Weidenfeld vs. Pacific Improvement Co., 267 F 699.

The short of it is that I cannot say to this veteran, within a few years of his pension, to get thee hence. His opponent has invoked the aid of a handmaiden of equity, the doctrine of laches. Upon such invocation, the defense of delay will be weighed by the courts in the scales of conscience. The trial court, upon the question of fact (laches) squarely presented to it, has held for the plaintiff. What we ourselves see is insistent assertion of rights, not sloth, not inaction. Moreover, we are committed to the well-established and salutary rule that in our review of certiorari we pass neither on the weight of the evidence nor on the credibility of the witness. There being no total lack of evidence to support the finding of the trial court, we will not disturb it on certiorari or on review thereof. Gaines vs. Betts, 2 Doug. 98; Randolph vs. City of Dearborn, 298 Mich. 224; I. L. Greyhound Lines vs. UAW-CIO, 341 Mich. 290. There is no error of law in this case.

Affirmed. Costs to appellee.

Edward M. Sharpe,
Concurred in result.

JUDGMENT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the first day of December, in the year of our Lord one thousand nine hundred and fifty-five.

Present the Honorable

Leland W. Carr,
Chief Justice,
Henry M. Butzel,
Talbot Smith,
Edward M. Sharpe,
Emerson R. Boyles,
Neil E. Reid,
John R. Dethmers,
Harry F. Kelly,
Associate Justices.

John N. Lenz,
Plaintiff,
vs. 46536
Albert E. Cobo,
Mayor of the City of Detroit,
Defendant and Appellant.

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is MANIFEST ERROR, Therefore, it is ordered and adjudged that the judgment of said Circuit Court for the County of Wayne be and the same is hereby reversed and vacated, and that no costs be awarded herein and that the cause

be remanded to the Court below and the writ of certiorari quashed.

STATE OF MICHIGAN — SS.

I, Hugh H. Carpenter, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 4th day of May, in the year of our Lord one thousand nine hundred and fifty-six.

Hugh H. Carpenter,
Clerk.

(SEAL)

FILED
JUN 4 1956
HAROLD B. WILLEY, Cl

Supreme Court of the United States

OCTOBER TERM—1955

No. 942

JOHN N. LENZ,
Petitioner,
vs.
ALBERT E. COBO,
Mayor of the City of Detroit,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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HELEN MILLER SMITH,
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Supreme Court of the United States

OCTOBER TERM—1955

No. 942

JOHN N. LENZ,
Petitioner,
vs.
ALBERT E. COBO,
Mayor of the City of Detroit,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

Petitioner, an employee of the City of Detroit, was served with notice of discharge on November 14, 1949. On November 28, 1949 and December 12, 1949 review of this discharge was had by hearings held in accordance with provisions of the City of Detroit charter before the Detroit Civil Service Commission. On January 27, 1950

further review of the discharge was had under the requirements of the Veteran's Preference Act of the State of Michigan (Act 205, Public Acts of 1897, as amended, being Section 35.402 of the Compiled Laws of 1948) before the Mayor of the City of Detroit, the respondent herein. Each of these tribunals upheld the discharge, the Civil Service Commission by order dated December 14, 1949 and the Mayor by order dated February 6, 1950. Petitioner thereafter sought no further review of the Civil Service Commission hearing, but did on February 5, 1951 apply for a Writ of Mandamus to set aside the decision of the Mayor. He charged that the hearing was not the "full hearing" as set forth in the Veteran's Preference Act. The Michigan Supreme Court held Mandamus to be an improper method of review by a decision rendered December 29, 1953 (*Lenz v. Cobo,* 338 Mich. 383). Thereafter and on September 27, 1954 petitioner filed the proper application for review, namely, a Writ of Certiorari. Respondent defended among other grounds on the defense of laches. The Supreme Court of Michigan sustained this defense and rendered its decision refusing consideration of the validity of the discharge because of Petitioner's laches. This decision was rendered December 1st, 1955 (*Lenz v. Cobo,* 343 Mich. 599). A petition for rehearing was denied March 1, 1956.

II.

ARGUMENT

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POINT A

NO FEDERAL QUESTION IS INVOLVED

The decision of the Supreme Court of Michigan, which petitioner here seeks to review, rests on a point of local or general law, namely the defense of laches. The majority opinion confines its discussion solely to this question of local practice. It does not pass upon, decide or even mention a Federal question. Petitioner's application for re-hearing in the Michigan Supreme Court, which was denied on March 1, 1956, discussed only the validity of the law of laches as announced in the Court's earlier opinion. Thus, at no point in the litigation was a decision made by the Michigan Court upon a Federal question.

Where, as here, a Federal question is not the basis of the State Supreme Court's decision, the Supreme Court of the United States has refused to issue its Writs of Certiorari. We cite the case of *Preston v. the City of Chicago,* 226 U. S. 447, 57 L. Ed. 293, 33 Supreme Court Rep. 177, wherein a police officer asked for a Writ of Mandamus to restore him to his employment with the City claiming that he could not be fired from his Civil Service position without a hearing. This Court held that it was bound by the State Supreme Court's decision that not only was the employee not under Civil Service protection, but also that he had delayed too long in questioning the validity of the discharge. At page 450 it is said:

> "Even, however, if we were at liberty to disregard the action of the state court and attribute

> to plaintiff in error the status claimed by him, as in addition the Court below held that the right to relief prayed for was in any event barred by long delay and laches, and this would be sufficient to prevent us from reviewing the alleged Federal question. *Moran v. Horsky,* 178 U. S. 205-207, 44 L. Ed. 1038-39, 20 Supreme Ct. Rep. 856."

To like effect *Wood v. Chesborough,* 228 U. S. 672, 57 L. Ed. 1018, 33 Supreme Ct. Rep. 706. *Edelman v. California,* 344 U. S. 357, 97 L. Ed. 387, 73 Supreme Court Rep. 293; *Missouri K. & T. R. Co. v. Sealey,* 248 U. S. 363, 63 L. Ed. 296, 39 Supreme Ct. Rep. 97; *Moran v. Hossky,* 178 U. S. 205, 44 L. Ed. 1039, 20 Supreme Court Rep. 856; *Seneca Nation of Indians v. Cristy,* 162 U. S. 283, 40 L. Ed. 970, 16 Supreme Court Rep. 828, *Johnson v. Risk,* 137 U. S. 300, 34 L. Ed. 683, 11 Supreme Court Rep. 111.

POINT B

NO FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT WAS EVER RAISED IN THIS CASE

The claimed violation of "due process" stems from the conduct of a "full hearing" required by the Michigan Veteran's Preference Act. The Supreme Court of the United States has on many occasions enumerated the requisites of a "full hearing". In this case there was no disposition to attack the principles of law thus announced. Thus, even if the Michigan court had passed on the merits of the hearing (and it did not so do) there would in this case be no new principle of law or federal question of substance not heretofore determined by the court.

POINT C

THE DECISION OF THE MICHIGAN SUPREME COURT IS SUPPORTED BY DECISIONS OF THE UNITED STATES SUPREME COURT

The Supreme Court of the United States subscribes to the law enunciated by the Michigan Supreme Court, that it is unnecessary to consider whether or not a removal from office or a discharge from employment is technically justified if the petitioner by his own laches has forfeited the right to have the action reviewed. See *U. S. v. Lane,* 249 U. S. 367, 63 L. Ed. 650, 39 Supreme Court Rep. 293. Also *Nicholas v. U. S.,* 257 U. S. 71, 66 L. Ed. 133, 42 Supreme Court Rep. 7; *Morris v. U. S.,* 257 U. S. 77, 66 L. Ed. 136, 42 Supreme Court Rep. 9.

We insert the above perhaps extraneous material since the issuance of a Writ of Certiorari is a matter of discretion, and under the announced rules of this court (Rule 19) the writ will be granted only where there are special and important reasons therefor. The rule of the Michigan Supreme Court and its decision on the law being in accord with generally accepted practice cannot be held to set forth any reason for a review even if a Federal question was involved.

POINT D

THE PETITIONER FOR WRIT OF CERTIORARI DOES NOT COMPLY WITH RULE 23 OF THE SUPREME COURT RULES

The rules of the Supreme Court adopted April 12, 1954, as amended October 11, 1955, set up a definite format for a petition for Writ of Certiorari and require a petitioner to state certain facts and set forth certain

points in the history of the litigation and pleadings therein. Petitioner has failed to follow the rule. We make mention of this in view of the statement in Rule 23 that such failure will be considered a "sufficient reason for denying his petition."

CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by Certiorari in this Court and that the petition for a Writ of Certiorari should be denied.

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HELEN MILLER SMITH,
G. EDWIN SLATER,
Assistants Corporation Counsel.

Dated: May 18, 1956.